Filed 7/27/20 In re Kaylee O. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re Kaylee O., a Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. RAYMOND R., Defendant and Appellant.	F079401 (Super. Ct. No. JD139070-00) **OPINION**

APPEAL from an order of the Superior Court of Kern County. Christie Norris, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)

Kristin B. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Margo A. Raison, County Counsel, and Bryan C. Walters, Deputy County Counsel, for Plaintiff and Respondent.

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INTRODUCTION

Raymond R. (father), noncustodial presumed father of Kaylee O., challenges the juvenile court's dispositional order in this dependency case. On appeal, father contends the juvenile court erred by (1) failing to place Kaylee with father without making a detriment finding pursuant to Welfare and Institutions Code section 361.2[1] and (2) bypassing him for reunification services pursuant to section 361.5, subdivision (b)(16). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In October 2018, the Fresno County Department of Social Services (Fresno department) filed a dependency petition on then-two-year-old Kaylee's behalf, alleging she came within the court's jurisdiction under section 300, subdivisions (b)(1) and (d). The petition alleged their mother failed to protect Kaylee and her half-sibling, G.O.,[3] and put them at risk of suffering sexual abuse by residing in a home with her boyfriend, a registered sex offender, whose offenses included molesting five- and seven-year-old girls.

At the time of the detention hearing, father was in custody for failure to register as a sex offender and had been incarcerated since October 2017. The court appointed counsel for father. Upon father's release from custody in November 2018, father told the Fresno department social worker he wanted Kaylee placed with his mother, Doris R., until he was ready to take care of her. Father said he wanted to reunify with Kaylee. Father stated he would be living in a home in Lancaster for two years as part of his probation and that he would have roommates. He told the social worker Kaylee is the

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1 All further undesignated statutory references are to the Welfare and Institutions Code.

2 We include only facts relevant to this appeal.

Pursuant to rule 8.90 of the California Rules of Court, we refer to some persons by their first names and/or initials. No disrespect is intended.

3 G.O. is not a party to this appeal.

most important part of his life and he wants to do everything to get her back in his care. Father said he was willing to complete programs ordered by the court.

On November 30, 2018, father filed a statement regarding parentage requesting to be declared Kaylee's presumed father. In the statement, father stated he wanted Kaylee to be placed with Doris because he was recently released from jail. Father stated he was not in a position to take custody of Kaylee but wanted Doris and her fiancé to take temporary custody of Kaylee until he was able to do so.

Father visited with Kaylee twice in November 2018. The Fresno department social worker indicated that it appeared Kaylee did not want to be around father and did not appear to have a parent/child relationship with him. During the first visit, at which Doris was also present, Kaylee was happy and excited to see Doris and gave her a hug but did not give father a hug and backed away when he tried to say hello to her. It was noted that throughout the visit, Kaylee refused to hug father and did not appear to want to interact with him. At the second visit, two days later, father attempted to hold Kaylee's hand, but Kaylee told him " 'no' " and continued to be distant from father throughout the visit.

The Fresno department's recommendation in its jurisdiction/disposition report was that if father was elevated to biological father, he be bypassed for services pursuant to section 361.5, subdivision (b)(16) because father was required to register as a sex offender.

The Fresno County Juvenile Court declined to rule on father's paternity status because the case was set to be transferred to Kern County. The Fresno County Juvenile Court found the allegations in the petition true and that Kaylee was described by section 300, subdivisions (b) and (d). The court set a "transfer out" hearing date.

In January 2019, father filed a statement regarding parentage in Kern County Superior Court again requesting to be declared presumed father. At father's first appearance in Superior Court of Kern County Juvenile Division, the "transfer-in" hearing

at which the court accepted the case from Fresno County, the court declared father to be Kaylee's presumed father. At this hearing, father's counsel requested emergency placement of Kaylee be made with Doris. The court gave the Kern County Department of Human Services (department) discretion to make emergency placement of Kaylee with Doris.

Pursuant to the court's order, the department conducted an assessment of Doris's home for emergency placement. Doris's fiancé lived with her part time and in Nevada part time, where he was building a house for them. Doris eventually planned to move to Nevada. Because Doris's fiancé had a substantiated history with child protective services, the department deemed Doris ineligible for emergency placement, and Doris was instead referred to the Resource Family Approval (RFA) process. Doris began the RFA process but later called the social worker and told her that she would be moving to Nevada and would like Kaylee to move there with her. The social worker informed Doris that she would have to complete the Interstate Compact for the Placement of Children (ICPC) process. The social worker asked Doris, " 'Am I clear that you are only interested in placement if Kaylee can be moved to Nevada[?]' " Doris responded that was correct. At a subsequent placement hearing, based on the department's report, the court ordered ICPC for the State of Nevada. In May 2019, however, the department was informed that Nevada ICPC denied Doris's relative home study as a result of the information obtained from a background check, and the ICPC case was closed.

Father had a visit scheduled with Kaylee in February 2019, but he was an hour and a half late and the visit was cancelled. Father provided the social worker with certificates of completion of courses for parenting education and life skills from March 2019 and April 2019, respectively. Father visited with Kaylee twice in April 2019. He did not show up to a scheduled visit in May 2019. During one of the April visits, father and Kaylee were observed playing with Play-Doh father stayed engaged with Kaylee throughout the visit and spoke with her in a calm and soothing voice. Father also played

with Kaylee outside; he kicked a ball with her and pushed her on the swings. It was reported that Kaylee enjoyed herself and was smiling and laughing. At one point, Kaylee accidentally hit herself in the eye with a doll and father comforted her by kissing and hugging her.

The department recommended father be bypassed for services pursuant to section 361.5, subdivision (b)(16). The department opined there appeared to be no risk of detriment to Kaylee resulting from this recommendation. The department noted that Fresno County documented father did not have a significant relationship with Kaylee and was incarcerated a significant amount of Kaylee's life—from October 2017 to November 2018—and that visits demonstrated she was not receptive to him and they did not appear to have a meaningful relationship. The social worker also noted Kaylee's current caretaker was committed to adopting Kaylee.

The dispositional hearing was held in May 2019. At the time of the hearing, father was living in a sober living facility. In support of the department's recommendation to bypass father for reunification services due to his requirement to register as a sex offender, the department provided a copy of an information filed against father on April 15, 2002. The information charged father with one count each—one count of rape by means of force, violence, duress, menace, or fear, and one count of unlawful sexual intercourse with a minor more than three years younger than father—against two separate victims, a 14-year-old and a 15-year-old. The department also provided a minute order dated May 28, 2002, indicating father pled guilty to two counts of unlawful sexual intercourse with a minor more than three years younger, and the rape counts were dismissed in the interest of justice. The department also provided a minute order dated June 25, 2002, indicating father was sentenced to three years eight months in prison and was required to register as a sex offender pursuant to Penal Code section 290.

Father testified on his own behalf and admitted that he had been arrested in 2001 for having unlawful sexual intercourse with a 14-year-old girl in violation of Penal Code

section 261.5. Father testified that he found out the girl was 14 years old and not 18 through the case. Father testified he was at an "all adult party" and his "best friend's mother was there" and "asked everybody what their ages are. And she wrote down their names, who was all at the party, and that's when I met that girl. I have never seen her before." Father testified he was "high and very drunk" at the party. Father testified he pled to the offense and there were no additional charges involving another girl. Father said as part of his sentence for the offense, he took sex offender and anger management courses, as well as substance abuse counseling. Father testified he is still enrolled in "[a]nger management, substance abuse and sex" classes. Father testified he completed 12 parenting classes.

Father testified he was first involved in Kaylee's life when she was two months old. He testified he lived several places with Kaylee and mother, until he and mother separated. He testified he got to have Kaylee "whenever [he] wanted" and remained in her life until he was taken into custody and convicted for a failure to register violation. When asked when he last saw Kaylee, father responded, "I actually have pictures. Last time I saw Kaylee was on her birthday of 2018, '17, something like that. Before she got taken away I took her to go buy some shoes for her birthday."

The juvenile court ordered Kaylee removed from mother's custody. The juvenile court bypassed mother for services pursuant to section 361.5, subdivision (b)(1) as her whereabouts were unknown. The juvenile court also bypassed father for services pursuant to section 361.5, subdivision (b)(16). The court noted: "[O]nce there's a denial [pursuant to a bypass provision] the standard is that there has to be clear and convincing evidence that giving services would be in the child's best interest. And I do not believe that any evidence was presented that can convince this Court that there's clear and convincing evidence that reunification services would benefit Kaylee at this time. [¶] I understand that there is a stigma with the [Penal Code section] 290 registrant; however, today in his testimony it seemed like he was minimizing. And at the end of the day, the

Court is required under [section] 361.5 to deny services unless there's clear and convincing evidence and that just isn't clear to me today."

The juvenile court did not set a section 366.26 hearing. This appeal followed.

DISCUSSION

I. Failure to Place Kaylee with Father Without Making a Detriment Finding Pursuant to Section 361.2

A. Section 361.2

Section 361.2, subdivision (a) reads in pertinent part: "If a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." A noncustodial parent also has a "constitutionally protected interest in assuming physical custody." (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 697 (*Isayah C.*).) The party opposing placement has the burden to show by clear and convincing evidence the child will be harmed if the noncustodial parent is given custody. (*In re Liam L.* (2015) 240 Cal.App.4th 1068, 1084.)

Under section 361.2, subdivision (b), if the court places the child with the noncustodial parent, the court initially has three alternatives. The court may order the noncustodial parent to assume custody of the child, terminate juvenile court jurisdiction, and enter a custody order. (§ 361.2, subd. (b)(1).) It may continue juvenile court jurisdiction and require a home visit within three months, after which the court may make orders as provided in subdivision (b)(1), (2) or (3). (§ 361.2, subd. (b)(2).) The court may order reunification services to be provided to the parent from whom the child is being removed, order services be provided solely to the parent assuming physical custody

in order to allow that parent to retain later custody without court supervision, or order services be provided to both parents in which case the court shall determine at a later review hearing which parent, if either, shall have custody of the child. (§ 361.2, subd. (b)(3).)

Section 361.2, subdivision (c) requires the juvenile court to make a finding either in writing or on the record of the basis for its determination under subdivisions (a) and (b).

"If the court does not order the noncustodial parent to assume custody under section 361.2, that is, if the court determines that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child, the court then proceeds to section 361.5, which generally governs the grant or denial of family reunification services." (*In re Adrianna P.* (2008) 166 Cal.App.4th 44, 59.) "If . . . the non custodial parent seeks reunification with his or her child, the court must order reunification services unless a specific statutory exception applies." (*Ibid.*)

It is the noncustodial parent's request for custody that triggers application of section 361.2; where the noncustodial parent makes no such request, the statute is not applicable. (*In re A.A.* (2012) 203 Cal.App.4th 597, 605.)

B. Analysis

Father contends the court erred by failing to place Kaylee with him in the absence of a detriment finding under section 361.2.

The parties do not dispute that father was a noncustodial parent. The parties disagree, however, as to whether father "requested custody" within the meaning of section 361.2, so as to trigger the court's requirement to make a detriment finding before assessing whether father should receive reunification services. Assuming for the sake of his argument that father requested custody, we find under the unique facts of this case, we can imply a detriment finding and that remand is not required.

" '[W]e cannot reverse the court's judgment unless its error was prejudicial, i.e., " 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " ' " (*In re Adam H.* (2019) 43 Cal.App.5th 27, 32.) When the court fails to make express findings under section 361.2, the appellate court may imply findings only where the evidence is clear. (*In re Adam H.*, at p. 32.)[4]

Here, this is a unique case where the evidence of detriment is clear. Father consistently expressed he could not take placement of Kaylee. We acknowledge this is not necessarily detrimental by itself based on *Isayah C.*, *supra*, 118 Cal.App.4th 684, upon which father relies. In evaluating whether placement with a noncustodial, incarcerated parent would be detrimental to the child, the *Isayah C.* court concluded that an incarcerated parent's plan to send his child to relatives deemed suitable by the department *pending his relatively short incarceration*, without more, did not constitute a sufficient showing of detriment under section 361.2, subdivision (a) to deny placement to the noncustodial parent. (*Isayah C.*, at p. 700.)

This case is unlike *Isayah C.* for several reasons. Here, father is not able to show the sole basis of detriment is a short incarceration during which he could provide care for

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[4] We note that the court in *In re Marquis D.* (1995) 38 Cal.App.4th 1813 (*Marquis D.*) and other courts (see, e.g., *In re V.F.* (2007) 157 Cal.App.4th 962, 966, citing *Marquis D.*) have held implied findings of detriment are inappropriate under section 361.2 where the court considers the incorrect code provision. In *Marquis D.*, the juvenile court ordered the children removed from the custody of the appellant, a noncustodial parent under section 361, subdivision (b), which was not applicable to noncustodial parents. (*Marquis D.*, at p. 1821.) Further, in its holding the juvenile court made a mistaken reference to a subdivision that had been recently renumbered alerting the appellate court to conclude the juvenile court was likely unaware of the newly enacted requirements in section 361.2, subdivision (a). (*Marquis D.*, at pp. 1824–1825.) Here, there is nothing on the record to indicate the trial court applied an incorrect code provision. The court made no order of removal from father, and father does not assert on appeal that the court applied an incorrect code provision. Further, father makes no response to the department's claim that we can imply a detriment finding in his reply brief. We conclude an implied detriment finding is appropriate under the unique facts of this case.

Kaylee. Rather, based on his own assessment, he was not in a position to take physical custody of Kaylee at that time and for an unspecified period. Even if father would be in a position to take custody of Kaylee after his two-year commitment at the sober living facility, this was nearly the entire length of Kaylee's life, not a "relatively short" period as in *Isayah C.* Father also expressed he needed parenting education services in order to be in a position to reunify with Kaylee. Further, father was not able to show he could provide for Kaylee's care by placing her with suitable care providers. The court had evidence before it that father's choice for placement, Doris's home, was unsuitable, as it did not meet the department's standards for emergency placement or the ICPC standards because Doris's fiancé had substantiated history with child protective services. Based on this record, we can imply a finding of detriment to Kaylee if she were placed with father. Remand is not necessary.

II. Denial of Reunification Services

A. Application of Section 361.5, Subdivision (b)(16)

Section 361.5, subdivision (b)(16) provides that reunification services need not be provided to a parent or guardian when the court finds by clear and convincing evidence that "the parent or guardian has been required by the court to be registered on a sex offender registry under the federal Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. Sec. 16913(a)), as required in Section 106(b)(2)(B)(xvi)(VI) of the federal Child Abuse Prevention and Treatment Act (42 U.S.C. Sec. 5106a(2)(B)(xvi)(VI))." This includes individuals required to register under Penal Code section 290. (See *In re S.B.* (2013) 222 Cal.App.4th 612, 621.)

An appellate court reviews a court's findings under section 361.5 for substantial evidence. (*In re G.L.* (2014) 222 Cal.App.4th 1153, 1164.) We presume "in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

Here, the court received into evidence documentation that father suffered a conviction which required him to register as a sex offender pursuant to Penal Code section 290. In addition, father testified he had been convicted of a sex offense and failed to register as a sex offender. The juvenile court's determination that the bypass provision of section 361.5, subdivision (b)(16) applied was supported by substantial evidence.

Father did not dispute below that the bypass provision of section 361.5, subdivision (b)(16) applied. Rather, he argued that despite the application of the bypass provision, reunification services should be provided to him pursuant to section 361.5, subdivision (c). Father now appears to contend the court erred by applying section 361.5, subdivision (b)(16), citing section 355.1. Section 355.1 provides in relevant part:

> "Where the court finds that either a parent, a guardian, or any other person who resides with, or has the care or custody of, a minor who is currently the subject of the petition filed under Section 300(1) . . . is required, as the result of a felony conviction, to register as a sex offender pursuant to Section 290 of the Penal Code, that finding shall be prima facie evidence in any proceeding that the subject minor is a person described by subdivision (a), (b), (c), or (d) of Section 300 and is at substantial risk of abuse or neglect. The prima facie evidence constitutes a presumption affecting the burden of producing evidence." (§ 355.1, subd. (d).)

Father contends he had no opportunity to rebut the jurisdictional presumption and argues the evidence he offered at disposition adequately rebutted the presumption. Father contends the length of time that had passed since his conviction, his not committing any sex-related offense since then, that the victims of his offense were not very young children and not related to father, his appropriate behavior with Kaylee, and the absence of evidence that father had been the subject of any child welfare referrals all tended to rebut the section 355.1 presumption. Father's reliance on section 355.1 is misplaced.

There is no indication the juvenile court used the section 355.1 presumption to take jurisdiction over Kaylee with regard to father in any way. This statute simply does not apply to the procedural stage of the proceedings to which father appeals. The issue

before the court was whether section 361.5, subdivision (b)(16) applied. As we have explained, the juvenile court's finding that it did was supported by substantial evidence.

B. Finding Reunification was not in Kaylee's Best Interest

Once the juvenile court finds a bypass provision under section 361.5, subdivision (b) applies, " ' "the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources." ' " (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.) The court is prohibited from ordering reunification services unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child. (§ 361.5, subd. (c)(2).) The burden is on the parent to change that assumption and show that reunification would serve the best interests of the child. (*In re William B.*, *supra*, at p. 1227.) Among factors to be considered are the parent's current efforts, the parent's history, the strength of relative bonds between the child and the parent and the caretakers, and the child's need for stability and continuity. (*In re Ethan N.* (2004) 122 Cal.App.4th 55, 66–67.)

The reviewing court cannot reverse the juvenile court's determination, reflected in the dispositional order of what would best serve the child's interest, absent an abuse of discretion. (*In re Ethan N.*, *supra*, 122 Cal.App.4th at pp. 64–65.)

Father argues he provided sufficient evidence to prove it would be in Kaylee's best interests for him to be provided with reunification services. In support of his argument, he points to the fact that he came forward and requested a judgment of parentage, completed a 12-session parenting program, participated in anger management classes, substance abuse treatment and drug testing, and had positive visits with Kaylee. We do not dispute father's stepping forward and participating in voluntary services is commendable and relevant to the court's determination. However, based on the totality of the record, we do not find the juvenile court abused its discretion by finding father had not met his burden. The record does not indicate a strong bond between father and Kaylee. The record shows father was incarcerated for much of Kaylee's short life. After

father was released from custody, it appears from the record he had six scheduled visits with Kaylee. During two of them, she did not appear to want to engage with him; one was cancelled because father was late; and father did not attend one. Father had one documented positive visit with Kaylee on this record. Moreover, Kaylee's caretaker was interested in adopting her. In light of the totality of the evidence, the juvenile court's finding that father had not met his burden of showing it was in Kaylee's best interests for him to receive services was not an abuse of discretion.

The court did not err by bypassing father for services.

DISPOSITION

The juvenile court's order is affirmed.

DE SANTOS, J.

WE CONCUR:

FRANSON, Acting P.J.

PEÑA, J.